Supreme Court, U.S.
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No. 95-175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FLETCHER'S FINE FOOD, LTD.,
Petitioner,
v.
JOHN GATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a corporation which is wholly owned by an agency or instrumentality of a foreign state, rather than by a political subdivision of a foreign state, and is not an "organ of a foreign state or political subdivision thereof" is subject to the jurisdiction of the United States Courts under the Foreign Sovereign Immunities Act?

LIST OF PARTIES

Plaintiffs and respondents John Gates, Robert Kinser, Clifford Travis, Dennis Conrad, Richard Doble, Edmund Vincelet, Richard Weyant and Jerome Binder (collectively "plaintiffs") are the certified class representatives of the approximately 300 persons who were formerly employed at the meat packing plant of defendant Victor Fine Foods ("Victor") in Lodi, California. In connection with their employment, plaintiffs were participants in defendant Victor Fine Foods Group Benefits Plan ("Plan"), an employee welfare benefit plan for the Victor employees, and are the certified class representatives of all participants existing at the time the Plan was terminated, as well as the dependent beneficiaries of those participants.

Victor was a trade name of defendant Golden Gate Fresh Foods, Inc., a California corporation ("Golden Gate"), which was the owner of the plant and was plaintiffs' employer. Victor itself (but not Golden Gate) has been dismissed from this case as a party defendant. Defendant Fletcher's Fine Foods, Ltd., a Canadian corporation ("Fletcher's"), the petitioner herein, was the corporate grandparent (now greatgrandparent) holder of a majority interest in Golden Gate. In turn, Fletcher's was wholly owned by defendant Alberta Pork Producers Development Corporation ("Alberta Pork"), a corporation established pursuant to the Alberta Marketing of Agricultural Products Act.

Defendant Fred Knoedler was the president and chief executive officer of Golden Gate, and at different times was and now is president and chief executive officer of Fletcher's. He was also a director of both entities, during times which overlapped. Defendant Bill Duckenfield was the executive vice president, chief operating officer and a director of Golden Gate. He is the market development manager of Fletcher's and served as its vice president in 1988.[1] Defendant George Paleopogou was the chief fi-

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[1] The "List of Parties" set forth in the Petition misrepresents that Bill Duckenfield has never been an officer of Fletcher's.

nancial officer and a director of Golden Gate, and at different times was chief financial officer and a director of Fletcher's. He has been dismissed from this case as a party defendant.

Defendants Assured Investors Life Company and Anthem Life Insurance Company are insurance companies which issued various insurance policies to Golden Gate. Anthem Life Insurance Company has been dismissed from this case as a party defendant.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John Gates, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's Opinion below. That Opinion is reported at 54 F.3d 1457 (9th Cir. 1995) and is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

In January 1992, plaintiffs filed a class action Complaint against their direct employer Golden Gate Fresh Foods ("Golden Gate") which owned and operated a pork processing plant in Lodi, California under the trade name Victor Fine Foods. Plaintiffs also named as de-

fendants: the Alberta Pork Producers Development Corporation ("Alberta Pork"), a Canadian corporation authorized by a regulation of the Province of Alberta to be established and operate as a marketing agent for Alberta Hog Producers [1]; petitioner Fletcher's Fine Foods, Ltd. ("Fletcher's"), a Canadian corporation which, through various corporate subsidiaries, owned a majority of the shares of Golden Gate and which, in turn, was wholly owned by Alberta Pork; Fred Knoedler, president and chief executive officer of both Golden Gate and Fletcher's; Bill Duckenfield, executive vice president, chief operating officer and a director of Golden Gate and the market development manager and former vice president of Fletcher's; the Victor Fine Foods Group Benefits Plan ("Plan"), the group health insurance plan covering employees of Golden Gate; and Assured Investors Life Company, the administrator of the Plan.

Plaintiffs asserted the following five claims for relief arising out of closure of the Lodi plant and termination of the Plan: (1) violation of the Worker Adjustment Retraining and Notification Act (WARN Act), 29 U.S.C. § 2101, *et seq.*, for failure to give sixty (60) days' notice of intent to close the Lodi plant; (2) violation of the health care continuation coverage provisions of the Employee Retirement Income Security Act of 1974, as amended, (ERISA), 29 U.S.C. §§ 1161-1168, for failure

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[1] Although Alberta Pork is subject to the general regulatory authority of the Alberta Agricultural Marketing Council, it is an independent corporation controlled and operated by a board and delegates comprised solely of private, commercial hog producers from Alberta. The exclusive purpose of Alberta Pork is to promote the profitable marketing and sale of hogs produced in Alberta for the private, commercial benefit of participating hog producers. Alberta Regulation 195/68. Alberta Pork's sole source of income is derived from a commission on the sale of hogs for member producers. Thus, Alberta Pork serves as the agent for Alberta hog producers in a private, commercial enterprise of marketing and selling Alberta produced hogs. It acts for, and on behalf of the hog producers and is subject to their control.

to give Plan participants and beneficiaries notice of entitlement to, and the right to convert to, continuation health care coverage upon termination of employment; (3) breach of Plan obligations for failure to pay benefits for covered health care services rendered prior to the termination of the Plan; (4) breach of fiduciary duty for failure to cause the Plan to pay covered pre-termination benefits and to offer continuation coverage; and (5) violation of § 510 of ERISA, 29 U.S.C. § 1140, for interfering with the plaintiffs' rights to elect continuation coverage by terminating the Plan in anticipation of the plant closure. (A copy of plaintiffs' Complaint is reprinted in the Petition at Appendix E.)

Defendants Alberta Pork and Fletcher's filed a motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, *et seq.*, claiming that they are "agencies or instrumentalities" of the Province of Alberta, Canada. In an Order dated May 24, 1993, the District Court declined to resolve the question of whether the Canadian defendants are "agents or instrumentalities" of Alberta, concluding that even if they did enjoy such status "the gravamen of the matters sued upon here are commercial in character for which defendants are not immune." *See*, Petition at A-54.

The District Court identified the basis of plaintiffs' claims to be their employment, then, by reference to the definition of "employer" under ERISA § 607(4), 29 U.S.C. § 1167(4), determined that both Alberta Pork and Fletcher's were the plaintiffs' employers and, therefore, that they were not entitled to immunity. The District Court observed that if foreign defendants are "considered employers, it is immaterial whether they are direct employers or employers based on an alter ego concept" for purposes of determining jurisdiction. *See* Petition at A-59. The District Court concluded that:

> Determination that the defendants are engaged in commercial activity within the United States with respect to the COBRA claim ends my query for ju-

> risdictional purposes. The FSIA provides this Court with jurisdiction over the "commercial activity" and not over "the claim." Because plaintiffs' claims are all based on defendants' status as an employer, the Court has jurisdiction over all the causes of action.

See, Petition at A-58, fn. 26.

Defendants Alberta Pork and Fletcher's filed an interlocutory appeal in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the District Court's decision as to Alberta Pork and affirmed as to Fletcher's. The Court of Appeals held that Alberta Pork was an "agency or instrumentality of the Province of Alberta." *See,* Petition at A-13. The Ninth Circuit further concluded that the allegations against Alberta Pork were not based on commercial activities and that Alberta Pork had not waived its right to claim immunity. Accordingly, the Court of Appeals held that, under the FSIA, Alberta Pork was entitled to immunity with regard to plaintiffs' allegations.

The Ninth Circuit concluded that Fletcher's, however, is not entitled to immunity under the FSIA because it was wholly owned by Alberta Pork, an "agency or instrumentality" of the Province of Alberta, rather than by the Province itself, or some other political subdivision of a foreign state. After reviewing the regulation adopted by the Province of Alberta which allowed private hog producers to form a marketing corporation[2] (Alberta Pork) and the 1981 amendment thereto which allows Alberta Pork to purchase businesses with the capacity to "process and sell pork and pork related products[3] (e.g., Fletcher's), the Court of Appeals observed that Fletcher's is "an ordinary pork processing plant." The Court then carefully considered the statutory distinctions between foreign states, political subdivisions, and agencies or in-

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[2] Alberta Regulation 195/68.

[3] Alberta Regulation 99/81.

strumentalities of foreign states and their political subdivisions, set forth in 28 U.S.C. § 1603, concluding that as a wholly owned subsidiary corporation of an "agency or instrumentality" of a political subdivision of a foreign state, Fletcher's is not entitled to immunity under the FSIA.

Based on that conclusion, the Court declined to discuss plaintiffs' arguments that Fletcher's is subject to jurisdiction in the United States courts pursuant to 28 U.S.C. § 1605(a)(2) by virtue of its commercial activity in the United States and/or waiver of its claim of immunity pursuant to 28 U.S.C. § 1605(a)(1).

The Ninth Circuit denied Fletcher's petition for rehearing and rejected its request for rehearing en banc by order dated June 22, 1995 and Fletcher's petitioned this Court for Writ of Certiorari on July 31, 1995. Respondents oppose the Petition for the reasons set forth below.

REASONS TO DENY THE WRIT

I. THE NINTH CIRCUIT OPINION DOES NOT CREATE A CONFLICT WITH OTHER CIRCUIT COURTS. RATHER, THE NINTH CIRCUIT APPLIED THE FACTS OF THIS CASE AND CONCLUDED THAT UNDER THE STATUTORY STRUCTURE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT, PETITIONER IS NOT ENTITLED TO IMMUNITY

In an effort to invoke this Court's jurisdiction, the petitioner attempts to create a conflict where there is none. The petitioner has attempted to establish a "tiering" doctrine of derivative immunity based on a small number of cases which are factually and/or procedurally distinguishable. Since there is no real or intolerable conflict among Circuits on the issue presented, there is no basis for review.

A. Decisions In Which Jurisdiction Was Not Denied On The Basis Of Foreign Sovereign Status Do Not Conflict With The Ninth Circuit's Decision In This Case

Petitioner cites seven decisions from six other Circuit Courts of Appeals which it claims are in conflict with the Ninth Circuit's opinion in this case.[4] In four of those cases, the issue of foreign state status was either not presented to the Court or the case was decided on alternative grounds. Only one of the seven decisions on which petitioner relies contains any analysis of the statutory interpretation issues on which petitioner seeks review, and that analysis appears in dicta. Moreover, the discussion of the issue in that case precisely mirrors the Ninth Circuit's analysis in this case, directly contradicting petitioner's representation of conflicting holdings.

In *Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993), *cert. denied sub nom., Ejay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds*, —— U.S. ——, 114 S.Ct. 2101, 128 L.Ed.2d 663 (1994), the Third Circuit was asked to review a district court holding that two Dutch parent corporations were subject to jurisdiction in a U.S. court under the FSIA's commercial activity exception to immunity, 28 U.S.C. § 1605(a)(2). The defendants in question were the top two links in a chain of five corporations which owned an office building in Philadelphia, Pennsylvania. The case involved various tort claims arising out of a fire in that building. The district court had ruled that the Dutch corporations were "foreign states" for purposes of the FSIA. While the Third Circuit specifically acknowl-

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[4] Petitioner also cites five decisions from the Ninth Circuit and six decisions from various district courts which it claims are in conflict with the decision herein. While allegedly conflicting decisions within the same circuit and from district courts are not identified as reasons for granting review in Sup.Ct.R. 10, for the sake of completeness, those cases, none of which presents an actual conflict, are discussed briefly, as well.

edged that it was not asked to review that aspect of the district court's decision, it nonetheless expressed doubt about the correctness of that holding, stating:

> As noted previously, none of the various parties dispute this determination on appeal. Judge Greenberg points out that while none of the parties contended in the district court and none have contended on this appeal that USA Holding is not a foreign state this assumption might not be correct. If USA Holding is a foreign state it can only be by reason of its ownership by APB which is an agency or instrumentality of the Dutch government. Judge Greenberg believes that a reasonable inference might be drawn that the term "foreign state" in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state. He reasons that if "foreign state" in § 1603(b)(2) includes an "agency or instrumentality" of a foreign state then it must also include a "political subdivision" of a foreign state yet § 1603(b)(2) expressly provides that an "agency or instrumentality" may be an "organ of" or be owned by a "political subdivision" of a foreign state. In this regard he points out that § 1603(a) expressly provides that "foreign state" includes both political subdivisions and agencies or instrumenalities. Thus, a reasonble inference can be drawn that the term "political subdivision" must have been used in § 1603 (b)(2) because "foreign state" in that section did not include a "political subdivision thereof." Otherwise the term "political subdivision" in § 1603(b)(2) is superfluous. Furthermore, it can be argued reasonably that Congress by the inclusion of "political subdivision" and the omission of "agency or instrumentality" in § 1603(b)(2) intended to distinguish between these types of entities, the inference being that the former but not the latter could own an entity which could be regarded as an agency or instrumentality of a foreign state.

Federal Insurance Co., supra, 12 F.3d at 1285, fn. 12.

Not only does the Third Circuit's reading of 28 U.S.C. § 1603(b)(2) fail to create a conflict, it presents precisely the same logical analysis of the clear statutory language articulated by the Ninth Circuit in this case.

None of the other cases cited by the petitioner scrutinize the structure of 28 U.S.C. § 1603(b). They are distinguishable for that reason alone, as well as for other reasons. *O'Connell Machinery Co. v. M. V. Americana*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984), involved the issue of whether a plaintiff could attach a foreign vessel for purposes of securing prejudgment interest. The defendants were an Italian shipping line owned by administrative agencies of the Italian government and a vessel owned by that shipping line. There was no ruling that the district court lacked jurisdiction over those defendants. To the contrary, the Second Circuit noted the express exception to immunity in 28 U.S.C. § 1605(b) for liens in admiralty cases involving commercial activity, and relied on legislative history indicating that Congress expressly intended the FSIA to provide a procedure for serving and obtaining in personam jurisdiction over foreign states so as to render unnecessary the practice of seizing and attaching the property of foreign states in order to obtain jurisdiction. *Id.* at 117, citing H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604.[5]

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[5] This same issue was presented in *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F.Supp. 1136 (D. Ma. 1984), one of the district court decisions cited by petitioner. In that case, the court quashed a writ of attachment on cargo owned by two defendants which were corporations wholly owned by the Republic of Indonesia on the ground that maritime jurisdiction did not apply. In the alternative, the court determined, on the basis of an affidavit submitted by the Consul of the Consulate General of the Republic of Indonesia, that the defendant corporations were "agencies or instrumentalities" of Indonesia and were, therefore, entitled to the protection against prejudgment attachment provided by the FSIA. In reaching that alternative holding, however, the court

Linton v. Airbus Industrie, 30 F.3d 592 (5th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 639, —— L.Ed. 2d —— (1995), presented the issue of whether the removal, statute, specifically 28 U.S.C. § 1441(d), bars appellate review of an order of remand based on lack of jurisdiction where the defendant failed to demonstrate its right to removal under the FSIA. While the Fifth Circuit did briefly discuss the issue of whether the defendant could be entitled to immunity as a foreign sovereign, that discussion was in dicta. *Id.* 30 F.3d at 598, fn. 29. The Court of Appeals expressly declined to decide the issue of immunity on the ground that it lacked jurisdiction to do so by virtue of a District Court decision holding that the defendants were not "instrumentalities" of foreign states, and were not, therefore, entitled to immunity. The Court dismissed the appeal, allowing the remand order to stand.[6]

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stated that, "this is a preliminary issue which does not interfere in any manner with the considered determination of the merits of this matter under the applicable law." *Id.* at 1145.

[6] Three of the district court cases which petitioner claims conflict with the holding in this case also involved issues of removal jurisdiction. In each of those cases, a foreign defendant who was sued in a state court removed the action pursuant to 28 U.S.C. § 1441(d) which permits removal by defendants who qualify as "foreign states" pursuant to 28 U.S.C. § 1603. While the defendants' right to removal was sustained in each of those cases, none of the bases hold that the defendants were immune from jurisdiction in the U.S. courts. In *Lopez del Valle v. Gobierno de la Capital*, 855 F.Supp. 34 (D. P.R. 1994), an asphalt company which was wholly owned by the nationalized Venzuelan Oil Industry was deemed to be a "foreign state" for purposes of removal jurisdiction, but was still subject to suit in the United States under the FSIA. Similarly, in *Balentine v. Union Mortgage Co.*, 795 F.Supp. 266 (N.D. Ill. 1992), a bank which was wholly owned and controlled by the Bank of Finland, a political subdivision of the Republic of Finland, was deemed to have properly removed an action to federal court on the basis of its "foreign state" status but was not entitled to immunity from suit. Finally, in *Talbot v. Saipem A.G.*, 835 F.Supp. 352 (S.D. Tex. 1993), a shipping line, the majority of shares of which were indirectly owned by the Ministry

The fourth decision cited by petitioner which was not resolved on the basis of foreign sovereign status is *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 10 F.3d 425 (7th Cir. 1993). While the Seventh Circuit observed in dicta that the defendant in question (Zenith Data Systems) was "practically an arm of the French state," it offered no analysis of whether the ownership structure of the various defendants defeated immunity because the conduct at issue was deemed to fall within the commercial activities exception to the immunity provided by the FSIA. *Id.*, 10 F.3d at 428.[7]

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of Treasury of the Republic of Italy, was deemed to have properly removed the action to federal court, but was forced to defend on the grounds that it waived any claim of immunity it might have by virtue of its conduct.

A fourth district court case cited by petitioner, *Ocasek v. Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992), involved a plaintiff's attempt to establish diversity jurisdiction in an action brought against a Canadian corporation allegedly owned by the Province of Quebec through a series of subsidiary corporations which were determined in an earlier case to be "foreign states" by virtue of Quebec's ownership and control. The *Ocasek* court dismissed the complaint on the ground that the plaintiff failed to demonstrate diversity because there was no evidence of current ownership by the Province. Notably, the same defendant was subject to jurisdiction in the earlier case because it involved a claim for which foreign states are not immune. *Id.*, 796 F.Supp. at 365.

[7] Two of the Ninth Circuit decisions which petitioner claims conflict with the decision in this case, were also decided on the basis of the commercial activities exception. In *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444 (9th Cir. 1991), *cert. denied sub nom., China Everbright Trading Co. v. Timber Falling Consultants, Inc.*, —— U.S. ——, 113 S.Ct. 295, 121 L.Ed.2d 219 (1992), a defendant corporation organized under the laws of China was deemed to be an "instrumentality" of China, but was not entitled to immunity from suit in the United States because the conduct giving rise to the suit was deemed to be commercial activity. In *Straub v. A P Green, Inc.*, 38 F.3d 448 (9th Cir. 1994), a defendant wholly owned by a Crown Corporation of the Province of Quebec, Canada was deemed to be an "instrumentality" of a foreign state. However, the Court of Appeals offered no

B. Decisions Involving Direct Ownership Of Corporate Defendants By Foreign States Have No Application To The Analysis Of This Case

The remaining decisions of other Circuits cited by petitioner for the proposition that ownership by an agency or instrumentality of a foreign state automatically confers immunity on a corporation are easily distinguished based on the character of the owners involved in those cases. In *Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni*, 761 F.Supp. 1143 (D. N.J. 1991), *aff'd mem.*, 958 F.2d 365 (3d Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992), the Court ruled that an entity owned and controlled by the Italian government engaged in aviation operations, which included military aircraft activities, could claim immunity under the FSIA even though its ownership by the government was through three tiers of administrative agencies. Unlike Alberta Pork, the evidence in *Trump Taj Mahal* indicated that the agencies in question were actually controlled by the Italian government which was actively involved in the operation of each successive entity.

In *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), the Court of Appeals remanded to the district court the issue of whether it had subject matter jurisdiction under the FSIA over two French corporations on the basis of the commercial acivities exception. The first corporation was wholly owned directly by the Republic of France. Though it is somewhat unclear in the decision, it appears that a majority of the shares of the second corporation were, in turn, owned by the first corporation.

Finally, in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), the Court concluded that defendants, which included the Republic of Ireland, two ad-

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analysis for that conclusion and jurisdiction was asserted over the defendant pursuant to the FSIA by virtue of the commercial activities exception to sovereign immunity.

ministrative agencies owned by Ireland, and a corporation wholly owned by one of those agencies were "foreign states" within the meaning of the FSIA. Notably, the plaintiff in that case specifically alleged in his complaint that the Irish agencies and the corporation owned by one of them were "agents of the defendant Republic [of Ireland]" and the District Court observed that, "[i]t is undisputed between the parties that all defendants are foreign states within the meaning of section 1603." *Id.* at 1024; 1026, fn. 19.

Similarly, in two of the Ninth Circuit decisions which petitioner claims conflict with this case, the parties did not dispute the defendants' status as foreign sovereigns. In *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466 (9th Cir. 1995), the plaintiff conceded in the district court that the Mexican Coffee Institute ("INMACAFE") was established under Mexican law and had met its burden if demonstrating sovereign status. *Id.* at 1470-71. In *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989), the defendant in question, Airmotive, was wholly owned by one of two entities which comprised the national airline of Ireland and which were directly owned by the Republic of Ireland. The court expressly noted that it was undisputed that those two entities were "foreign states," and, though not clearly articulated in the decision, Airmotive, by virtue of its owner's foreign state status, fell within the definition of "agency or instrumentality of a foreign state."

The one remaining decision on which petitioner relies in an effort to invoke this Court's jurisdiction by asserting a conflict in *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787 (D.D.C. 1985). The two defendants seeking immunity in that case were Transportes Aereos Militares Ecuadorianos ("TAME"), which was created as a department of the Ecuadorian Airforce by the Government of Ecuador's Military Council, and the Transportes Aereos Nacionales Ecuadorianos ("TAME C.A."), an entity which was 99.97% owned by

TAME. The court concluded that TAME, as a department of the Ecuadorian military, was a "foreign state" and TAME C.A., by virtue of its owner's foreign state status, was an "agency or instrumentality" of a foreign state.

Unlike the defendants seeking immunity in the above cases, petitioner herein is not owned either directly or indirectly by the federal government of Canada, the provincial government of Alberta, or by any political subdivision of either of those governments. Rather, it is owned by Alberta Pork, an independent corporation controlled and operated by private hog producers subject only to the general regulatory authority of the Alberta Agricultural Marketing Council. At best, Alberta Pork is an "agency or instrumentality" of a political subdivision of a foreign state. Thus, petitioner, an "ordinary pork procesing plant" owned by Alberta Pork, cannot claim sovereign immunity based on its relationship to Alberta Pork because a majority of its shares are not owned by a "foreign state or political subdivision thereof," as required to meet the definition of "foreign state" set forth in 28 U.S.C. § 1603(b).

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE STATUTORY STRUCTURE OF THE FSIA AND CONGRESS' OVERRIDING CONCERN FOR THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY

Petitioner concedes that the Ninth Circuit's analysis in this case is consistent with a "literal reading of the interrelationship between Sections 1603(a) and 1603(b)" of the FSIA. Indeed, the Ninth Circuit carefully observed the rule that it must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 105 S. Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), quoting, *Park'n Fly, Inc. v. Dollar Park and*

Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 661, 83 L.Ed.2d 582 (1985).

Nonetheless, petitioner argues that this Court should review the Ninth Circuit's analysis on the ground that other Circuits, in the decisions cited above, have applied a broader and equally "tenable" reading of the governing statutory provisions. As discussed above, each of those cases is readily distinguishable from the facts and procedural posture of this case. The decisions relied upon by petitioner did not require the careful analysis of statutory structure employed by the Ninth Circuit in this case, either because the issue was not before the court, or the defendants in those cases were able to demonstrate majority ownership by a "foreign state," or that one of the statutory exceptions to immunity applied.

Moreover, the Ninth Circuit's analysis in this case is consistent with Congress' concerns that the "restrictive" principle of sovereign immunity apply and that American citizens should have "access to the courts in order to resolve ordinary legal disputes" with entities owned by foreign states. H.R. Rep. No. 94-1487, 94 Cong., Second Sess. 15, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6605. The broad reading of the statutory provisions defining "foreign state" advocated by the petitioner is not supported either by the plain language of the statute or the legislative history.

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT PETITIONER IS NOT AN "ORGAN" OF A FOREIGN STATE OR POLITICAL SUBDIVISION THEREOF

In addition to its argument that as a "lower-tier" corporation it is entitled to derivative immunity, petitioner asserts that it is an "organ" of Alberta Pork and is entitled to immunity on that basis. Petitioner correctly notes that Congress did not expressly define "organ" and proposes that the term be construed to encompass any "subordinate entity that either is controlled by another

entity or that acts for the benefit of that other entity." Petitioner then asserts that it benefits Alberta Pork because, in accordance with Alberta Regulation 99/81, Fletcher's was purchased "[i]n order to enable the Board [of Alberta Pork] to effectively promote and sell hogs and processed pork."

The plea for a grant of certiorari on this ground should be denied for two reasons. First, it is obvious from a reading of 28 U.S.C. § 1603(b)(2) that a defendant seeking immunity cannot be both an "organ of a foreign state or political subdivision thereof" and an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . ." The fact that Congress differentiated between the term "organ" and entities connected by ownership interest indicates that it did not intend the definition of "organ" to include corporate entities.

Second, the definition of "organ" proposed by petitioner has no basis in the law and is so vague and overbroad it would encourage claims of immunity by defendants Congress never intended be covered by the FSIA. The proposed definition was simply invented for purposes of Fletcher's petition. Moreover, petitioner's claim that its activities are at least in part for the benefit of Alberta Pork is unfounded. The regulation permitting Alberta Pork to purchase private pork processing concerns (Alberta Regulation 99/81) amends the Alberta Pork Producers' Marketing Plan which was approved by the Alberta Agricultural Products Marketing Council and codified in an earlier regulation (Alberta Regulation 195/68). The Marketing Plan was designed to promote hog sales for the benefit of private hog producers. Alberta Pork, which is controlled and operated by those producers, is merely a means to that end.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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